QUESTION PRESENTED

WHETHER A DEATH SENTENCE IMPOSED UPON A DEFENDANT CONVICTED OF FIRST DEGREE MURDER IS DISPROPORTIONATE TO THE CRIME IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION, WHEN THE DEFENDANT'S PARTICIPATION IN THE CAPITAL FELONY WAS MAJOR, TO-WIT: THE DEFENDANT PLANNED THE CAPITAL FELONY, WAS PRESENT WITHIN A FEW HUNDRED FEET OF THE MURDERS, DROVE THE GETAWAY VEHICLE, AND PARTICIPATED IN AN ATTEMPT TO AVOID DETECTION BY DISPOSING OF THE MURDER WEAPONS?

PARTIES

In the Supreme Court of Florida, Petitioner was the appellant and the State of Florida was the appellee.

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CITATATIONS TO OPINIONS BELOW

The opinion of the Supreme Court of Florida upon which review is sought is reported as Enmund v. State, 399 So.2d 1362 (Fla. 1981). Rehearing was denied on July 20, 1981.

STATEMENT OF THE CASE

Respondent does not accept Petitioner's Statement of the Case and instead asserts the statement of the case as set forth by the Supreme Court of Florida in its opinion in Enmund v. State, 399 So.2d 1362 (Fla. 1981):

> This cause is before the Court on appeal from a judgment of conviction on two counts of murder in the first degree and one count of robbery. The Circuit Court of the Tenth Judicial Circuit, in and for Hardee County, sentenced appellant Earl Enmund to death, thus vesting in this Court jurisdiction of his appeal. Art. V, § 3(b)(1), Fla.Const.
>
> The appellant and co-defendant Sampson Armstrong were tried together and convicted of the first-degree murders and robbery of Thomas and Eunice Kersey. After returning verdicts of guilt the trial jury heard evidence on the issue of sentence pursuant to section 921.141, Florida Statutes (1975), and recommended the death penalty for both defendants: The trial court imposed sentences of death on the appellant for the two counts of first degree murder and a sentence of life imprisonment for the crime of robbery. We affirm the judgments of guilt of murder and robbery and the sentences of death.

Id. at 1363.

STATEMENT OF FACTS

Respondent does not accept Petitioner's Statement of Facts as set forth in Petitioner's Statement of the Case and instead tenders the following facts as set forth by the Supreme Court of Florida in its opinion:

> On April 1, 1975, at about eight o'clock, a.m., the bodies of Thomas and Eunice Kersey were discovered by their daughter in their rural Hardee County home, located on state highway 62 between Fort Green to the west and Wauchula to the east. Mr. and Mrs. Kersey, aged eighty-six and seventy-four respectively, had been shot to death.
>
> Some of the evidence constituting the state's case in the trial court consisted of physical items recovered at the scene and examined in the course of investigation. The bodies were found on the kitchen floor, near the back door of the home. There was a quantity of blood on the floor, some five feet away from where the bodies were lying, that prompted the authorities to investigate the possibility that one of the perpetrators was wounded during the attack. Later that morning, police found Jeanette Armstrong, the wife of co-defendant Sampson Armstrong, being treated for a gunshot wound in a hospital in nearby Avon Park, in Highlands County. The blood recovered at the scene proved to be of a different type from either of the Kerseys' blood, and to match the blood type of Jeanette Armstrong.
>
> On the ground outside the house, investigators found a plastic jug filled with water.
>
> There were four firearm projectiles found at the scene. One was on the ground outside the house, one in the door jamb of the back door, one in the water heater in the kitchen of the house, and one on the floor, under the body of Mrs. Kersey. Mrs. Kersey was shot six times in all, with three of the wounds being superficial so that three of the bullets exited the body. Three bullets remained in her body and were recovered. The three bullets found in the body all entered the body in the right side and passed downward.
>
> Mr. Kersey was shot twice. One bullet entered his right arm and

passed on through his heart to the left side of his body. The other entered his chest from directly in front. Both bullets were recovered. The bullet that entered from the right side had a slight downward angle. The one that entered the front of the chest was almost straight in its path from front to back. According to expert firearms identification testimony, one of the bullets recovered was a .38 caliber and the other was a .22 caliber. The .38 caliber bullet from the body of Mr. Kersey, a .38 caliber bullet from the body of Mrs. Kersey, and the .38 caliber bullet found in the kitchen door jamb, where [sic] all fired from the same weapon. The .22 caliber bullet found in the body of Mr. Kersey and a .22 caliber bullet from Mrs. Kersey were both fired from the same gun.

The pathologist who testified at trial told the court and the jury that when a bullet enters the body, it can be deflected in numerous ways, so that it is difficult to discern the angle of fire from the path of the bullet. With regard to the specific question of reconstructing the position of Mrs. Kersey when she was shot, based on the paths of the bullets, the pathologist testified, "Well, there are all sorts of possibilities. . . . There is really no way that I could determine what position her body was in when she was shot. . . . [S]he was shot from below, above, and behind." None of the entrance wounds on either of the bodies were inflicted from a range of closer than several feet away.

The state presented the testimony of a witness who drove by the Kersey home between 7:30 and 7:40 a.m. on the day the bodies were found. When she passed the Kersey home, she saw on the side of the road a large, cream-colored car with a license tag bearing the prefix number 18. There was a black man in the car. Another witness for the state drove by the house at 7:35 that morning and saw a car parked beside the road about two hundred yards west of the house. It was a large, yellow car with a dark colored top. There was one person in the car.

The state's evidence also included the testimony of two of the Kerseys' neighbors. One testified that on April 1st he was at work on his own land only two or three hundred yards from the

Kerseys' house when, at about 7:45 a.m., he heard from six to fifteen shots of gun fire and some highpitched screaming. The other neighbor said that he lived only two hundred yards west of the Kerseys, and that between 7:30 and 8:00 o'clock that morning he heard about seven loud sounds. He would have thought that they were caused by Mr. Kersey hammering to separate some scrap metal, except for their irregular sequence. From the sounds he remembered, he concluded that they also could have been gunfire.

A neighbor of the appellant also testified for the state. He said he lived about three-fourths of a mile from Enmund's home, and that they both lived on a road that runs off of New York Avenue south of the town of Wauchula. This witness testified that on the morning of April 1st, at about 6:30 he was standing out beside the road, New York Avenue, that goes into Wauchula to the north. He was waiting for a ride that was to take him to another town on personal business. The person who was to meet him there did not come that morning, but he was still standing there waiting for him after 8:00 o'clock. The witness said that at approximately 6:30 or 6:45, he saw Earl Enmund and his former common-law wife Ida Jean Shaw in their yellow Buick with a vinyl top. Ida Jean Shaw was driving. There were two others in the back seat, one male and one female. The car traveled north toward town (the town of Wauchula). At about 8:00 o'clock, the car came back, travelling "pretty fast" in a southerly direction on New York Avenue, with the appellant driving, Ida Jean Shaw in the front seat, and one of the other two people in the car lying down across the back seat.

The husband of the Kerseys' granddaughter testified that Mr. Kersey usually kept large amounts of cash on his person. He generally kept the cash in the form of one-hundred-dollar bills. It was not unusual for him to have from ten to twenty of these on his person at any given time. He kept the money in his wallet, and the wallet was in his hip pocket at all times. He normally slept in his regular work clothing and kept the wallet in his pocket even as he slept.

Mr. Kersey, the witness testified, liked to show his cash to people he dealt with, and he did so frequently

and indiscriminately. He tended to save his money rather than to spend it, and he was proudly vocal about having it. He was a large, strong man who felt that he could protect his wallet.

Another witness testified that two weeks prior to the murders, he saw that Mr. Kersey had from twelve to fifteen hundred dollars on his person.

A few weeks prior to the murders, the appellant and a friend jointly purchased a calf from Mr. Kersey. They paid him in cash and when Mr. Kersey took out his wallet to put away the money he showed them its contents. Appellant Enmund said, "Look at the money this man's got." Mr. Kersey responded, "That ain't no money. I can dig up $15,000, $16,000 any time I want to." Appellant's friend told Mr. Kersey that he shouldn't be showing his money around like that. Mr. Kersey said, "I know you, Jim." The other man responded, "Yeah, you know me but you don't know the rest of them." After the killings, Mr. Kersey's wallet was not found on his person or anywhere in the house.

J. B. Neal testified that at about noon on April 1, 1975, he saw co-defendant-Sampson Armstrong in Lake Placid, in Highlands County. Armstrong told Neal that he and his wife Jeanette had done a robbery that morning at a ranch house outside of Wauchula and that Jeanette had been shot. Armstrong told the witness that they had gone to the back door of the house of an elderly man and woman, saying that they needed water for an overheated car. When Mr. Kersey came out of the house, Armstrong grabbed him, held his gun on him, and told Jeanette to get the money out of his pocket. Then, the old man cried out to his wife, and through a window Armstrong saw Mrs. Kersey coming out the front door and around the house with a gun. Mrs. Kersey shot Jeanette Armstrong. Then Armstrong knocked the old man down and shot Mrs. Kersey. Mr. Kersey got back up and Armstrong shot him in the chest. After the shooting, they put the old people in the house, took the money and left.

Jeanette Armstrong is the daughter of Ida Jean Shaw. In April of 1975, Ida Jean Shaw and Earl Enmund were living together as husband and wife,

and had been doing so for about twelve years.

There was testimony that the investigating authorities, based on witnesses' descriptions of the car seen near the Kersey home the morning of the murders, began to search for a large, yellow or cream-colored car with a dark top and having an "18" license tag prefix. They found a car meeting this general description in the possession of Ida Jean Shaw.

At Walker Memorial Hospital in Avon Park on the morning of the murders, police questioned Ida Jean Shaw concerning Jeanette Armstrong's gunshot wound. She told them that she and Jeanette had been travelling that morning from Wauchula to Avon Park when Jeanette entered an orange grove to urinate and was shot. In the subsequent course of the investigation of the Kersey murders, Ida Jean Shaw gave a statement to the state attorney implicating the appellant and Sampson Armstrong in the crimes. Subsequent to that initial statement, she gave two statements, one of them a formal deposition, in which she repudiated the original statement. In these statements she said that Jeanette Armstrong left her house on March 31, 1975 with two men referred to as Luke and Willie. According to this story, Jeanette said that they were going to Fort Myers to a nightclub. On the following morning, Luke and Willie brought Jeanette home wounded. Jeanette, Luke and Willie then told Ms. Shaw to tell anyone who asked that Jeanette had been shot while trespassing in a citrus grove. The import of the story told in the depositions was to implicate "Luke and Willie" in the Kersey murders and to exculpate the defendants. In one of her depositions, Ida Jean Shaw stated that her earlier statement implicating the defendants in the crimes was false and was fabricated by agreement with Jeanette Armstrong and calculated to put Earl and Sampson in jail and thus be free of the strictures of married life.

Ida Jean Shaw, over the objection of the defendants, was called to testify at trial as a court's witness. The court examined her and then the state and counsel for each of the defendants cross-examined her.

Ms. Shaw testified at trial as follows. At and around the time of

the crimes, she and the appellant lived together in a house on Revell Road in Wauchula, and that they had held themselves out to friends and neighbors and in business transactions as husband and wife for twelve years. Her daughter Jeanette was married to Sampson Armstrong and lived in Lake Placid. On the weekend preceding Tuesday, April 1st, Ms. Shaw celebrated a birthday. On Friday night, Jeanette came to her home. On Sunday, she and Jeanette went to Lake Placid and brought Sampson back. On Monday night, March 31, Jeanette, Sampson, and the appellant Enmund were all there at the house in Wauchula. On Tuesday, April 1st, when she awoke at about 7:45 a.m., none of the three was there. Neither was her brown and yellow 1969 Buick.

Ms. Shaw got up and went to the neighborhood wash house. About ten minutes later, either Enmund or Sampson Armstrong came into the wash house and told her that Jeanette had been shot. Ida Jean Shaw went back to the house. Jeanette was in the appellant's red Plymouth automobile. Sampson was with her and the appellant was in the house. Ms. Shaw then took Jeanette up to the local store corner and called an ambulance. Then appellant Enmund came to the corner where they were awaiting the ambulance and asked her what had happened to Jeanette. Ida Jean Shaw told Enmund that Jeanette had been shot in an orange grove. Then the ambulance came and Ida Jean accompanied Jeanette on the ride to the hospital. Ida Jean learned from Jeanette how she was shot. Earl followed in a separate car. Sampson Armstrong also went to the hospital that day.

After spending Tuesday morning at the hospital, Ms. Shaw left there with Earl and Sampson. They went to Wauchula to get the children and then went on to Lake Placid. On the way to Wauchula, Ida Jean Shaw asked the appellant "why he did it." He replied that he had seen Mr. Kersey's money and therefore decided to rob him. Sampson Armstrong said that he made sure the people were dead.

Ida Jean Shaw testified further that on Wednesday, April 2, 1975, she, Earl, Sampson, and some of her children were in a car on their way home from the hospital when Sampson gave her $200. By passing written notes in the car, she

asked him how much money he got out of the robbery and he responded that he had $600 left. She took the $200 and made a loan payment on an account of Earl Enmund's that was in arrears. There was corroborating testimony of this, and that the bill was paid with two one-hundred-dollar bills.

Ms. Shaw testified that prior to the events of April 1st, she kept a .22 caliber pistol in the glove compartment of her car. On April 2, she removed the gun from the loft at her house on Earl Enmund's directions. He and Sampson told her to get rid of the gun and also a .38 caliber pistol that was at the house, because, Sampson said, they had been used to kill some people. She put the guns in the bottom of a bucket of greens and gave the bucket to a friend, Jeanette's paternal uncle. This person testified that the bucket was a large and heavy metal one and that the greens spoiled in the trunk of his car. He said he threw them away, bucket and all, and didn t know about the guns. The murder weapons were never recovered.

At trial Ms. Shaw testified that the story about Luke and Willie was a complete fabrication, and that she made up the story and related it at the request of the defendants. Earl Enmund, she said, instructed her on this matter in letters smuggled out of the jail.

The state's counsel moved that Ida Jean Shaw be called as a court's witness on the ground that due to the inconsistencies in her pretrial statements, the state was not certain how she would testify and would not vouch for her credibility. Through her examination by the court, cross-examination by the state, and cross-examination by counsel for each of the defendants, the following matters pertaining to her credibility were brought out for consideration by the jury. Ms. Shaw was granted immunity from prosecution for any role she might have played in the murders and robbery. As related above, she gave several inconsistent statements during the investigation and prosecution of the crimes. One of her statements was in a deposition under oath, and at trial she conceded that she had lied in that statement. Prior to the trial, she was charged with perjury. She was arrested and held in jail for thirteen days. The prosecutors advised

her of the maximum penalty for the crime of which she stood accused. Then they promised her that she would not be prosecuted for perjury if she would testify at the murder and robbery trial and tell the truth.

399 So.2d at 1363-1367.

JURISDICTION

The jurisdiction of this Court is asserted under 28 U.S.C. § 1257(3).

REASONS WHY THE WRIT SHOULD NOT BE GRANTED

The sole issue raised by Petitioner is that his death sentences are allegedly disproportionate to the crimes of murder for which he was convicted. Petitioner's argument is predicated on his allegation that he did not intend that the victims be killed and that he was not physically present at the exact scene of the murders. However, the State of Florida strongly asserts that the penalty for a first degree murder conviction is a matter of state law and that Petitioner has not presented a substantial federal question.

In Gregg v. Georgia, 428 U.S. 153, 187 (1976), this Court held that a sentence of death could be imposed for a particular offense if the procedure followed in reaching the decision to impose the death penalty was not constitutionally infirm and the sentence was based upon consideration of the particular circumtances of the offense and the character of the offender. In reaching its conclusion, the Court recognized that the determination of whether a particular crime was suitable for the death penalty was a question particularly suited to resolution by state legislators and that "a heavy burden rests on those who attack

the judgment of the representatives of the people." Id. at 428 U.S. 175. "That States have authority to make aiders and abettors equally responsible, as a matter of law, with principals, or to enact felony-murder statutes is beyond constitutional challenge." Lockett v. Ohio, 438 U.S. 586 (1978).

Petitioner contends that, notwithstanding the legislative mandate of the will of the people of the State of Florida that the death penalty is appropriate in a felony murder case, the death sentence in Petitioner's case is disproportionate to the crime because Petitioner did not intend that the victims be killed and he was not present at the exact scene of the murders. However, the Court needs only to look at some of the facts of Petitioner's case in order to determine that his involvement in the crime was much more substantial that he would have the Court believe. For example, the trial court found as a matter of fact and as an aggravating circumstance that the murders were committed for pecuniary gain and that the robbery of the elderly Mr. Kersey was planned by Petitioner after he had personally observed Mr. Kersey with a large amount of money on his person. Enmund, supra, at 1372. The trial court stated that Petitioner was an accomplice in the capital felony and that his participation in the capital felony was major. The trial court also found that Petitioner actively participated in an attempt to avoid detection by causing the murder weapons to be destroyed or lost. Id. at 1373. Similarly, the Supreme Court of Florida found that it was reasonable for the jury to conclude that Petitioner was present in the getaway car merely a few hundred feet away from the murder scene and that Petitioner was the one who drove the getaway car when it was seen speeding away from the murder scene on the morning of the killings. Id. at 1365, 1370. Thus, when considering whether Petitioner's sentence was disproportionate to the crimes for which he was convicted, it must be remembered that his participation was major. Id. at 1373.

Again, however, despite the fact that Petitioner's participation in the murders was substantial, Petitioner claims that the death penalty was disproportionate in his case because he did not intend to kill. In support of this proposition, he relies heavily on Justice White's concurring opinion in Lockett, supra. Although Lockett's death sentence was reversed on other grounds, Justice White went further and expressed the view that the Eighth Amendment was violated by imposition of the death penalty "without a finding that the defendant possessed a purpose to cause the death of the victim." Id. at 438 U.S. 624. However, in a separate concurring opinion, Justice Blackmon strongly disagreed:

> I do not find entirely convincing the disproportionality rule embraced by my Brother White. The rule that a defendant must have had actual intent to kill, in order to be capitally sentenced, does not explain why such intent is the sole criterion of culpability for Eighth Amendment purposes. What if a defendant personally commits the act proximately causing death by pointing a loaded gun at the robbery victim, verbally threatens to use fatal force, admittedly does not intend to cause a death, yet knowingly creates a high probability that the gun will discharge accidentally? What if a robbery participant, in order to avoid capture or even for wanton sport, personally and deliberately uses grave physical force with conscious intent to inflict serious bodily harm, but not to kill, and a death results? May we as judges say that for Eighth Amendment purposes the absence of a "conscious purpose of producing death," post, at 628, 57 L Ed 2d, at 1004, transforms the culpability of those defendants' actions?
>
> Applying a requirement of actual intent to kill to defendants not immediately involved in the physical act causing death, moreover, would run aground on intricate definitional problems attending a felony murder. What intention may a State attribute to a robbery participant who sits in the getaway car, knows that a loaded gun will be brandished by his companion in the robbery inside the store, is willing to have the gun fired if necessary to make an escape but not to accomplish the robbery, when the victim is shot by the companion even though not necessary for

> escape? What if the unarmed participant stands immediately inside the store as a lookout, intends that a loaded gun merely be brandished, but never bothered to discuss with the triggerman what limitations were appropriate for the firing of the gun? What if the same lookout personally intended that the gun never be fired, but, after his companion fires a fatal shot to prevent the victim from sounding an alarm, approves and takes off?
>
> The requirement of actual intent to kill in order to inflict the death penalty would require this Court to impose upon the States an elaborate "constitutionalized" definition of the requisite mens rea, involving myriad problems of line drawing that normally are left to jury discretion but that, in disproportionality analysis, have to be decided as issues of law, and interfering with the substantive categories of the States' criminal law. And such a rule, even if workable, is an incomplete method of ascertaining culpability for Eighth Amendment purposes, which necessarily is a more subtle mixture of action, inaction, and degrees of mens rea.

Id. at 438 U.S. 614 n.2.

Justice Rehnquist reached a similar conclusion in even more direct terms:

> I finally reject the proposition urged by my Brother White in his separate opinion, which the plurality finds it unnecessary to reach. That claim is that the death penalty, as applied to one who participated in this murder as Lockett did, is "disproportionate" and therefore violative of the Eighth and Fourteenth Amendments. I know of no principle embodied in those Amendments, other than perhaps one's personal notion of what is a fitting punishment for a crime, which would allow this Court to hold the death penalty imposed upon her unconstitutional because under the judge's charge to the jury the latter were not required to find that she intended to cause the death of her victim. As my Brother White concedes, approximately half of the States "have not legislatively foreclosed the possibility of imposing the death penalty upon those who do not intend to cause death." Ante, at 625, 57 L Ed 2d, at 1002. Centuries of common-law doctrine establishing the felony-murder doctrine, dealing with the relationship between aiders and abettors and principals, would have to be rejected to

> adopt this view. Just as surely as many thoughtful moralists and penologists would reject the Biblical notion of "an eye for an eye, a tooth for a tooth," as a guide for minimum sentencing, there is nothing in the prohibition against cruel and unusual punishments contained in the Eighth Amendment which sets that injunction as a limitation on the maximum sentence which society may impose.

Id. at 438 U.S. at 635, 636. See also, Stein v. New York, 346 U.S. 156 (1953), where this Court previously upheld the death sentence of a defendant convicted of felony murder, although the defendant did not actually do the killing.

Thus, there is competent authority that a defendant's lack of intent to kill should not be a bar to the imposition of the death penalty. This is not to say, however, that in Florida the intent of a defendant convicted of felony murder is not relevant--evidence of a defendant's intent is properly admissible in mitigation during the sentencing phase of a capital trial. The jury's weighing of the aggravating circumstances versus mitigating circumstances has previously been upheld by this Court in Proffitt v. Florida, 428 U.S. 242 (1976). See also, Jacobs v. State, 396 So.2d 1113, 1117 (Fla. 1981), where the Supreme Court of Florida has recently stated that "the jury should be allowed to weigh all the facts and circumstances surrounding the homicide, so that their advisory verdict will be the result of reasoned judgment rather than an exercise in discretion." However, it is extremely significant to note that during the sentencing phase of Petitioner's trial, Petitioner offered absolutely no evidence in mitigation (R 1677).

Therefore, it is clear that under Florida law the degree, nature, and character of a defendant's mens rea in regard to the commission of the murder, while having little or no outward bearing on the question of guilt under the felony-murder concept, are highly relevant in the sentencing process and are admissible

n Florida in mitigation. As stated previously, Petitioner took an active part in the criminal transaction which resulted in his murder convictions. While it does not appear that he pulled the trigger, he was certainly free to present this fact in mitigation. Under Florida law, both the jury which renders an advisory sentence and the trial court which determines the actual sentence, are permitted to consider all the facts and circumstances of the crime, including the fact that the convicted felon did not intend to kill. This procedure is not constitutionally infirm. Proffitt, supra. Moreover, the fact that Florida law thus encourages those engaged in robbery to leave their guns at home and to persuade their coconspirators to do the same in the hope that fewer victims of robberies will be killed does not offend the Constitution.

CONCLUSION

The decision of what penalty to impose for a particular type of criminal conduct is one traditionally left with the lawmaking bodies of the various states. The state legislature is in the best position to determine the will of the people, and such legislative determination should not lightly be set aside. Gregg, supra. Although Petitioner was apparently not the triggerman in the two murders involved in his case, both the trial court and the Supreme Court of Florida found that his participation in the crimes was substantial in that he devised the idea for the robbery, planned the robbery, assisted in the perpetration of the robbery, drove the getaway car, and helped dispose of the murder weapons. That Florida has chosen to punish such reprehensible criminal conduct with a death sentence is not violative of the Constitution. Petitioner has simply not asserted a substantial federal constitutional question. Accordingly, Respondent respectfully requests that Petitioner's petition fcr writ of certiorari be denied.

Respectfully submitted:

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy hereof has been furnished to WILLIAM C. MCLAIN, Assistant Public Defender, Chief, Capital Appeals, Hall of Justice Annex, 495 N. Carpenter Street, Bartow, FL 33830-3798, by U. S. Mail this 25th day of September, 1981.

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